**IN THE UNITED STATES DISTRICT COURT**
**FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

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| ROBERT L. MOY, III, | : | |
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| Plaintiff, | : | CIVIL ACTION |
| | : | |
| v. | : | NO. 01-CV-5693 |
| | : | |
| M&T MORTGAGE CORPORATION and JOHN DOES (1-5), | : | |
| | : | |
| | : | |
| Defendants. | : | |

**MEMORANDUM**

BUCKWALTER, J. April 5, 2002

Defendant M&T Mortgage Corporation ("M&T") seeks to dismiss the complaint for lack of standing, since the claim is "traceable directly" to conduct that occurred before Plaintiff filed for bankruptcy, thereby making the claim property of the bankruptcy estate, rather than Plaintiff's. For the reasons discussed below, the motion is **DENIED.**

## I. Statement of Facts

In December 1997, M&T informed Plaintiff that insurance on his rental property at 9931 Lackland Drive, Philadelphia (the "rental property") had elapsed. According to Plaintiff, M&T refused to accept the insurance Plaintiff purchased, and instead purchased a more expensive policy. According to Plaintiff, beginning in January 1998, every mortgage payment he sent to M&T was either cashed and not applied to mortgage, not cashed and held by M&T, or

cashed and applied to his inappropriately expensive insurance policy. At some point, again according to Plaintiff, M&T also began to charge unwarranted fees and penalties to his account.

On March 20, 1998, Plaintiff filed a petition for bankruptcy under Chapter 7. Plaintiff did not seek to exclude any claim against M&T from his assets which passed directly to the bankruptcy estate. Plaintiff's petition sought to reaffirm his obligations concerning the rental property. Plaintiff listed M&T as a secured creditor since it held the mortgage on the rental property.

In May 1998, M&T filed a Motion for Relief from Chapter 7in order to foreclose on the rental property. Although Plaintiff was aware of the insurance dispute earlier (and even though the complaint appears to imply that he knew of the mortgage payment problems at the time of the bankruptcy petition as well), Plaintiff asserts that this was the first time he was aware of a problem with his mortgage payments. Plaintiff alleges that he demonstrated to M&T's counsel that he had consistently paid his mortgage, and as a result, the motion was withdrawn. Plaintiff asserts that M&T's counsel represented to him that his account would be corrected.

The bankruptcy was discharged on July 20, 1998 and closed without further proceeding on August 19, 1998. Later that month, Plaintiff decided to sell the rental property. At closing in October, Plaintiff was provided a payoff amount from M&T that allegedly included unearned attorney's fees, and also did not give Plaintiff credit for numerous mortgage payments made during 1998. At that point, Plaintiff alleges, he first learned that M&T had not made the corrections to his account discussed back in May. Plaintiff claims that M&T's counsel – again – told him the account would be corrected at a later date. Subsequently, M&T refused to correct the account.

Plaintiff filed the instant complaint in October 2000, claiming, *inter alia*, that M&T failed to credit certain payments to his account, and improperly charged him with other fees and penalties, resulting in his paying an inappropriately high payoff amount at closing when he sold the rental property.

**II. Discussion**

Section 541 of the Bankruptcy Code provides that, upon commencement of a Chapter 7 proceeding, that "all legal or equitable interests of the Debtor in property, as of the commencement of the case" become assets of the bankruptcy estate. 11 U.S.C. § 541(a)(1). Furthermore, "any interest in property that the estate acquires after the commencement of the case" is also estate property. 11 U.S.C. § 541(a)(7). Causes of action are considered property under § 541. However, causes of action that accrue to the debtor *after* commencement of the proceeding are not property of the estate.

In O'Dowd v. Trueger (In re O'Dowd), 233 F.3d 197 (3d Cir. 2000), the debtor acknowledged that she possessed a cause of action for legal malpractice at the time she filed for bankruptcy, and therefore, that cause of action properly belonged to her bankruptcy estate. The bankruptcy trustee proposed settling that claim for $10,000. After the debtor formally objected, the court permitted the *debtor* to proceed to prosecute the action. In return, the court held, the estate was entitled to the first $10,000 of any net proceeds. The debtor hired a new attorney and the case was eventually settled for an undisclosed amount. Afterward, the debtor realized that her new attorney had failed to bring certain claims in the lawsuit that had since become time-barred. Therefore, she sued the new attorney in a second legal malpractice suit.

The Third Circuit held that the debtor could not maintain this second legal malpractice claim because it constituted interest in property acquired by the *estate* after the commencement of the case under § 541(a)(7). The Court reasoned that (1) although the conduct giving rise to the malpractice claim occurred post-petition, the second malpractice case was "traceable directly" to the first malpractice case, which accrued before the petition and was therefore *estate* property; and (2) despite the fact that the debtor was entitled to prosecute the claim and keep any proceeds above $10,000, since the first malpractice claim belonged to the estate, the effect of the second case of alleged malpractice was to reduce the value of the *estate*.

M&T argues that, under O'Dowd, Plaintiff's claims must be dismissed for lack of standing because they are "traceable directly" to pre-petition conduct that began in December 1997, before the bankruptcy case was filed in March 1998. However, O'Dowd is not on point for two reasons, and, furthermore, M&T misconstrues O'Dowd.

First, in O'Dowd, the pre-petition conduct gave rise to a cause of action (the first malpractice cause of action) that *accrued before the petition,* and was therefore part of the original bankruptcy estate under § 541(a)(1). Therefore, the Court reasoned, the second malpractice cause of action that *accrued after the petition* was considered estate property because it was "traceable directly" to the estate's cause of action that had *accrued beforehand.* As a result, the Court held that the second malpractice cause of action was property acquired by the estate after the commencement of the case under § 541(a)(7). In the case at bar, although the facts are a bit murky on this point, Plaintiff argues that the cause of action ultimately *accrued after* the filing of the petition. Significantly, M&T has also not challenged this assertion by arguing that a cause of action formally *accrued before* the bankruptcy petition filing. As such,

Plaintiff's cause of action is not similarly "traceable directly" to conduct that gave rise to a cause of action that was part of the original bankruptcy estate. Therefore, there is no reason to consider Plaintiff's cause of action property acquired by the estate after the commencement of the case, as the court held in O'Dowd.

As noted above, M&T has *not* argued that a cause of action accrued *before* the bankruptcy petition filing. Instead, M&T interprets O'Dowd as holding that all post-petition claims that are "traceable directly" to a debtor's pre-bankruptcy dealings or conduct belong to the estate. M&T relies on the O'Dowd court's description of the second, post-petition malpractice claim as "traceable directly" to both "pre-petition conduct" as well as the debtor's "pre-bankruptcy dealings" with her first attorney. However, M&T misconstrues O'Dowd. Under a plain reading of the relevant text of the Code, the estate does not have a property interest in a debtor's cause of action that technically accrues post-petition, even if the claim is based in part on conduct or dealings that may have occurred pre-petition. See Brunswick Bank & Trust Co. v. Atanasov (In re Atanasov), 221 B.R. 113, 116-18 (D.N.J. 1998). That a *cause of action accrued* pre-petition, and was part of the original bankruptcy estate, was critical to the O'Dowd court's holding that a subsequent, post-petition cause of action "traceable directly" to it is also estate property. In this case, again, no party has argued that a cause of action formally accrued before the bankruptcy petition was filed.

Second, the Court in O'Dowd emphasized that the effect of the post-petition malpractice was to reduce the value of the estate available for the debtor's creditors. In this case, however, there is no reason to believe that the dispute affected the value of the estate available to creditors. Before closing on the sale of the rental property, for the most part what Plaintiff

alleges he was entitled to was simply proper credit for mortgage payments already tendered to a secured creditor, as opposed to an award that could have been used to satisfy other creditors during the bankruptcy proceeding.

M&T also cites cases in which courts refused to permit debtors to prosecute causes of action that *accrued pre-petition*, since those claims became part of the bankruptcy estate upon commencement of the action under § 541(a)(1). See, e.g., Feist v. Consolidated Freightways Corp., 100 F. Supp.2d 273, 275 (E.D. Pa. 1999), aff'd, 216 F.3d 1075 (3d Cir. 2000). This is unlike the situation in O'Dowd, where the court held that the cause of action that *accrued after* the bankruptcy filing nonetheless became part of the estate afterward under § 541(a)(7). In any case – to repeat – no party has argued that the claims in this case accrued pre-petition. Therefore, these cases are inapposite as well.

An order follows.

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| Defendants. | : | |

**ORDER**

AND NOW, this 5th day of April 2002, upon consideration of Defendant M&T Mortgage Corporation's Motion to Dismiss (Docket No. 6), Plaintiff's response thereto (Docket No. 8), and Defendant's Reply (Docket No. 9), it is hereby **ORDERED** that Defendant's motion is **DENIED**.

BY THE COURT:

RONALD L. BUCKWALTER, J.